

Sheridan Drive Super Duper, Inc. d/b/a Tonawanda Super Duper and Food Store Employees' Union Local 34, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Case 3-CA-10114

March 10, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 19, 1981, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Sheridan Drive Super Duper, Inc. d/b/a Tonawanda Super Duper, Tonawanda, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Member Jenkins would compute the interest due on the backpay awarded herein based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146, 148 (1980).

Member Zimmerman finds that the issuance of a broad order is inappropriate under the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

DECISION

FINDINGS OF FACT

STATEMENT OF THE CASE

WALTER H. MALONEY, JR., Administrative Law Judge: This case was heard by me in Buffalo, New York, based on an unfair labor practice complaint,¹ issued by

¹ The principal docket entries in this case are as follows:

the Acting Regional Director for Region 3, which alleges that Respondent Sheridan Drive Super Duper, Inc., d/b/a Tonawanda Super Duper,² violated Section 8(a)(1) and (3) of the Act. More particularly, the complaint alleges that Respondent's agents unlawfully interrogated employees concerning their union activities, created among employees the impression that their union activities were subject to company surveillance, and instructed employees not to sign union cards. The complaint also alleges that Respondent discharged Joan E. DiCenso because of her activities on behalf of the Union. Respondent denies the allegations of independent violations of Section 8(a)(1) of the Act and asserts that DiCenso was discharged because of inattention to her assigned duties. The issues herein were framed up on these contentions.

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent is a family corporation owned by two brothers, Paul and Ronald Schiappa. It operates four grocery stores which bear the Super Duper trade name together with the name of the city or street where the store is located (Sheridan Drive, Kenmore, Tonawanda, and Harlem Road). Two of the four stores (Harlem Road and Kenmore) are entirely owned and operated by the Schiappa brothers. The other two stores, the Sheridan Road store and the Tonawanda store involved in this proceeding, are owned in part by the Schiappas and in part by the S. M. Flickinger Corporation. In those two stores, Flickinger has a 51 percent interest. The Sheridan Road store is the only one of the four stores organized by a labor union.

The events at issue in this case took place in October and November 1980. However, these events have curious and unusual antecedents which should be noted at the outset. In March 1980, just before the Tonawanda store opened, a meeting of employees was held by Respondent's management at an establishment called the Romulus Club. At this meeting, Paul Schiappa stated that the store would more than likely be operated as a union store. Both he and Store Manager Ronald Bickelman handed out union cards for UFCW Local 34, asked the employees to sign the cards, and collected them.

On June 30, 1981, 3 months later, Union Business Representative Louis Coniglio sent a hand-delivered letter to William K. Houseknecht, vice president of the Flickinger Corporation, the majority stockholder in the Tonawanda

The charge filed herein by Food Store Employees' Union Local 34, affiliated with United Food and Commercial Workers International Union, AFL-CIO (herein called the Union or Local 34), against Respondent on November 18, 1980; complaint issued against Respondent on December 17, 1980; Respondent's answer was filed on December 24, 1980; hearing held in Buffalo, New York, on October 5, 1981; briefs were filed with me by the General Counsel and Respondent on or before November 2, 1981.

² The name of Respondent was amended at the hearing.

Respondent admits, and I find, that it is a New York corporation which maintains its principal place of business in Tonawanda, New York, where it operates a retail grocery store. In the course and conduct of this business, Respondent, during the calendar year 1980, had a projected gross income in excess of \$500,000 and received goods valued in excess of \$50,000 directly from points and places located outside the State of New York. Accordingly, Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

Super Duper store. He represented to Houseknecht that the Union represented a majority of the employees at the Tonawanda store, requested Flickinger to recognize and bargain with Local 34, and also requested a meeting at 10 a.m. the following morning at the union office for the purpose of a card check.

Houseknecht was present for a card check the following morning at the union office. The check was conducted by James Biggs, who is identified in the record only as an individual used by the Union from time to time for the purpose of conducting card checks. To no one's surprise, the check revealed that 74 out of 109 Tonawanda Super Duper employees had signed Local 34 designation cards.³ Houseknecht immediately signed a recognition agreement.

During the summer of 1980, John MacLeod, an employee of the Tonawanda store, organized two meetings of employees to discuss the contract they were going to get.⁴ There was dissatisfaction with the terms of the contract, so the employees present, including DiCenso, signed a petition expressing a desire to get rid of the Union as their bargaining agent. MacLeod filed an unfair labor practice charge against S. M. Flickinger on August 25, 1980, alleging that Flickinger had unlawfully assisted the Union in gaining its majority status (Case 3-CA-9965). Flickinger settled this charge with an informal agreement, approved by the Regional Director for Region 3 on September 26, which it agreed not to recognize the Union unless it became certified. A notice carrying out the terms of the settlement agreement was posted at the Tonawanda store.

On November 4, Tonawanda meat department employee Ron McCormick and DiCenso had a meeting at Denny's Restaurant on Niagara Falls Boulevard with Coniglio for the purpose of discussing the organizing of the Tonawanda store. They were later joined by employee Larry Coons. Coniglio explained how to go about soliciting signatures on authorization cards and gave cards to McCormick and DiCenso for that purpose. During the following week, DiCenso spoke to about 20 or 30 employees at the store for the purpose of obtaining signed cards. She turned in about 13 signed cards, including the one she signed herself. A few days after this employee meeting, Coniglio and Jack Brennan, a member of the Union's executive board, visited the Tonawanda store and spoke with David Schiappa. Coniglio told David Schiappa that they would be coming around the store to organize the employees and said that, if management behaved like they had in the past, there would be no problems. David Schiappa said he would have to check with Ron Schiappa and added that he did not think it would be a good idea to speak to employees at the store. David Schiappa later mentioned this visit to Ronald Schiappa. The latter informed David Schiappa that the Union had no permission, either from Flickinger or from himself, to organize in the store.

During the brief period of time that DiCenso was campaigning in early November for the Union, she overheard Assistant Store Manager Ronald Henderson tell two stockroom employees that they were not allowed to sign union cards. They asked Henderson why not. His reply was that he did not know and was just going by what David Schiappa had told him.⁵ DiCenso also overheard David Schiappa talking with MacLeod. David Schiappa told MacLeod that he had received word from Ronald Schiappa that no one was to sign union cards. MacLeod was also told on this occasion that Ronald Schiappa wanted MacLeod to instruct other employees not to sign cards. MacLeod asked David Schiappa why and David Schiappa replied that he did not know.

On the Saturday before she was discharged, DiCenso was in the breakroom with MacLeod and Ronald Schiappa. MacLeod told Ronald Schiappa that "here's someone you should talk to about keeping the union out of the store." Ronald Schiappa turned to DiCenso and asked her, "What's your problem?" DiCenso replied that she did not have any problem. He then asked her, "What's this about the union?" She replied that she did not know. Ronald Schiappa went on to say to her that the union would do nothing but screw the employees out of their money and he could give her names and contracts involving people who had been screwed. DiCenso replied, "Fine. Get me the names and the contract and I'll see what the Union can do." He reminded her that the Union "wasn't for nothing." Her reply was, "What will you do for us if the Union doesn't come in?" Ronald Schiappa said, "Not a g.d. thing!"⁶

On November 13, when DiCenso arrived at work, she was paged and requested to come to the store manager's office. When she arrived, Meat Manager Tom Koenig and Bickelman were there. Bickelman said that the store was going to start cutting back on the hours of employees and that she was going to be laid off. DiCenso asked why she was being laid off and Bickelman replied that he had asked Koenig who was the worst worker in the meat department, one whom he could get rid of easily. According to Bickelman, Koenig had informed him that he was lucky to get 20 hours of work out of DiCenso in a 40-hour week and that she was too friendly with customers. I credit her testimony that Bickelman also said that employees in the store were beginning to wonder who she was screwing to keep her job. DiCenso asked when her last day would be. Koenig was largely silent during this discussion but spoke up and at the end suggested that she be allowed to work out the rest of the week.⁷

³ David Schiappa was the grocery manager at the Tonawanda store. He is the son of one owner and the nephew of the other owner.

⁴ Ronald Schiappa was at the hearing but did not testify. MacLeod testified for Respondent but was not examined concerning this conversation. Under well-settled rules of evidence, I conclude that, had they testified on this point, they would have corroborated DiCenso.

⁵ Koenig also did not testify during this proceeding and Respondent's failure to summon him is unexplained. Koenig was DiCenso's immediate superior and the person best able to observe her in the performance of her duties. I invoke the same rule of evidence regarding Koenig's absence as I have for Ronald Schiappa's failure to testify.

³ Despite the fact that the unit contained only 109 employees, the Union presented Biggs with 129 cards.

⁴ Although this contract was never clearly identified fully in the record, presumably it was the Local 34 contract then in effect at the Sheridan Road store.

After this meeting broke up, DiCenso had occasion to speak with Assistant Manager Bruce Shapiro. She told Shapiro that she knew why Bickelman was getting rid of her and told Shapiro that she would get the Union into the store if it was the last thing she ever did. Shapiro made no response. I credit her testimony that, a few minutes later, she was summoned to return to Bickelman's office. On this occasion, Bickelman told her there was a lot of union talk going around. DiCenso replied that she would not know about it. Bickelman then asked her if she had any cards containing names and signatures. She replied that, even if she had some, she would not give them to Bickelman. Bickelman's final words to her were that he had just talked with Ronald Schiappa and they had decided that she could leave the store immediately but would be paid for the balance of the week. DiCenso returned to the meat department, assisted the part-time meatwrapper who was then on duty to complete the wrapping work which was available, and then left the store.

II. ANALYSIS AND CONCLUSIONS

A. *The Independent Violations of Section 8(a)(1)*

1. When, in early November, Henderson told stock-boys they were not to sign union cards, he was illegally instructing them not to engage in protected concerted activities and union activities in violation of Section 8(a)(1) of the Act.

2. When David Schiappa told MacLeod that employees were not to sign union cards and that Ron Schiappa wanted MacLeod to pass the word to other employees to this effect, he was illegally instructing employees not to engage in protected concerted activities and union activities in violation of Section 8(a)(1) of the Act.

3. When Ronald Schiappa asked DiCenso snappishly, "What's this about the union?" and "What's your problem," he was coercively interrogating her concerning her union sympathies and activities in violation of Section 8(a)(1) of the Act.

4. After she was notified of her discharge, Bickelman asked DiCenso if she had any union cards containing the names and addresses of employees who had signed. This attempt to engage in surveillance both of DiCenso's union activities and the union activities of other employees violates Section 8(a)(1) of the Act.

B. *The Discharge of Joan E. DiCenso*

Joan E. DiCenso worked as a meatwrapper for Respondent from the time it opened the Tonawanda store until November 13, 1980, a period of about 8 months. According to the information given to DiCenso at her exit interview, the basis for Respondent's action in terminating her was that it was attempting to reduce costs by laying off an employee and that DiCenso was selected for layoff at this time because, in light of her work record, she was the most expendable of more than 100 Tonawanda store employees. I regard this justification or defense a pretext and conclude that the real reason Respondent terminated DiCenso was because she was the in-house leader of a new and unsponsored organizing campaign.

There is no evidence that any employee other than DiCenso was ever terminated or laid off for reasons of economic necessity. Moreover, Bickelman testified that, while the Tonawanda store was predictably not doing the business it did during its opening days in March and April, its volume during the months of October and November was about the same. Assuming that November's volume was not April's volume, why was DiCenso laid off in November, if November's volume was not perceptibly different from the October figure? As her discharge coincided with the advent of a new union drive, this event rather than economic considerations provides a more plausible explanation for the timing of the discharge than does the volume of business transacted by the store.

The next question not satisfactorily explained by Respondent is why, out of more than 100 employees, was the leader of the in-house organizing drive selected for discharge on the occasion of an economic layoff? The asserted reason for selecting DiCenso was that she was goldbricking or "dogging the job." No complaint was ever registered as to the service rendered when she was actually engaged in wrapping meat and maintaining the meat counter display. Respondent places heavy responsibility for this selection on Koenig, her immediate superior, who assertedly told Bickelman that DiCenso was the employee he could best afford to lose. However, as noted above, Koenig did not come forward to testify to this evaluation and no explanation can be found in the record for his absence. I conclude from that fact that Koenig's reported evaluation was not so damaging to DiCenso as Respondent would make out. The record also reflects, without contradiction, that Koenig frequently complimented DiCenso on her job performance. No effort was made to compare her efforts with those of other employees who, even according to company witnesses, were disposed to "goof off" from time to time, either in the backroom or elsewhere. O'Hanrahan, the deli manager, reported to company management complaints emanating from her subordinates that DiCenso was taking too many breaks, but this complaint was stale news by the time DiCenso was actually terminated. The further complaint from the deli manager that meat department employees were disrupting the deli operation by passing through the deli on their way to the break area and elsewhere was not a complaint about DiCenso *per se* but about all meat department employees, whose principal access to their place of work was routed through the work area of other employees. This problem can hardly be laid at DiCenso's doorstep or used as a basis for singling her out for particular criticism.

DiCenso was in fact the principal in-house organizer of the renewed union effort and Respondent knew it. MacLeod brought this fact to Ronald Schiappa's attention that Saturday before she was fired and Schiappa responded to the information by questioning DiCenso and disparaging her efforts in a manner which violated the Act. Company knowledge, suspicious timing, collateral evidence of animus, and implausible explanations for company action all combine in this case to make it clear that DiCenso was discharged because of her sympathies

with and activities on behalf of the Union. Accordingly, the discharge violated Section 8(a)(1) and (3) of the Act. I so find and conclude.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent Sheridan Drive Super Duper, Inc. d/b/a Tonawanda Super Duper is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Food Store Employees' Union Local 34, affiliated with United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Joan E. DiCenso because of her activities on behalf of the Union, Respondent has violated Section 8(a)(3) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by coercively interrogating employees concerning their union sympathies and the union sympathies of other employees; by instructing and directing employees not to sign union authorization cards; by creating in the minds of employees the impression that their union activities are the subject of company surveillance, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. Because the actions found herein constitute serious and pervasive violations of the Act, I will recommend to the Board a so-called broad 8(a)(1) remedy designed to suppress any and all violations of that section of the Act. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). I will also recommend that Respondent be required to offer to Joan E. DiCenso full and immediate reinstatement to her former job, or to a substantially equivalent position, and that it be required to make her whole for any loss of earnings which she may have sustained by reason of the discrimination practiced against her, in accordance with the *Woolworth* formula,⁹ with interest thereon at the adjusted prime rate used by the Internal Revenue Service for the computation of tax payments. *Olympic Medical Corporation*, 250 NLRB 146 (1980); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will also recommend that Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record herein considered as a whole, and pursuant to Section 10(c) of the Act, I make the following recommended:

ORDER⁹

The Respondent, Sheridan Drive Super Duper, Inc. d/b/a Tonawanda Super Duper, Tonawanda, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities and the union activities of other employees.

(b) Instructing and directing employees to refrain from signing union authorization cards.

(c) Creating in the minds of employees the impression that their union activities are the subject of company surveillance.

(d) Discouraging membership in and activities on behalf of Food Store Employees' Union Local 34, affiliated with United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization by discharging or otherwise discriminating against employees in their hire or tenure.

(e) By any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer to Joan E. DiCenso full and immediate reinstatement to her former job, or substantially equivalent position, without prejudice to her seniority or other rights previously enjoyed, and make her whole for any loss of earnings she may have suffered by reason of the discrimination, found herein, in the manner described in the section of this Decision entitled "Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll and other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at Respondent's Tonawanda, New York, store copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

⁹ *F. W. Woolworth Company*, 90 NLRB 289 (1950).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate our employees concerning their union activities or the union activities of other employees.

WE WILL NOT instruct or direct our employees to refrain from signing union cards.

WE WILL NOT discharge or otherwise discriminate against our employees in their hire or tenure in order to discourage their membership in and activities on behalf of Food Store Employees' Union

Local 34, affiliated with United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended. These rights include the right, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection.

WE WILL offer full and immediate reinstatement to Joan E. Dicenso to her former job, or substantially equivalent position, and WE WILL make her whole for any loss of earnings she may have suffered by reason of the discrimination practiced against her, with interest.

SHERIDAN DRIVE SUPER DUPER,
INC. D/B/A TONAWANDA SUPER
DUPER